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IN THE SUPREME COURT OF THE UNITED STATES

NO. 226

MRS. CORAL B. JONES, ET AL
Appellants
VS.
W. P. H. McFADDIN, ET AL
Appellees

APPELLANTS' ANSWER OF APPELLEES' MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

We make the following as a reply to the appellees motion to dismiss this cause. With reference to the Treaty of Guadulupe Hidalgo, we submit that this treaty protects the claimants of the land involved hereinbefore described. Article 6, Section 2, of the Constitution of the United States reads as follows to-wit:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Section 3 also reads as follows to-wit:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several states shall be bound by Oath of Affirmation, to support this Constitution; but no religious Test

shall ever be required as a Qualification to any Office or public Trust under the United States."

The treaty of 1848 that the Guadulupe Hidalgo we contend is still the law of the land. The Supreme Court of Texas had all these things before them, but they did not pass on them and all they said were the following words and figures to-wit: "This case is dismissed for lack of jurisdiction," and that is all they said.

We contend that it is still the law and will always be the law. Appellees cite several cases but none of the courts had any authority to change the treaty of the Constitution of the United States already cited hereinbefore. As to the doctrine of Mortmain, it was the law of Spain and Mexico, and the Province of State of Coahuila and Texas long before this grant was issued.

We respectfully submit that this grant of land was made by the competent authority of the State and under the colonization laws of Lorenzo de Zavala which had full authority to judicially make this grant and is a judiciary act which cannot be impeached or changed by any court. They had full jurisdiction to act in this case.

The grant as translated is as follows to-wit:

7-16-57 Pelham Humphries (21.00) Vol. 22 pp. 307-310

THIRD SEAL FOR THE BIENNIAL TERM OF

(SEAL)

TWO REALS 1834 and 1835

Petition
No. 118

Honorable Special Commissioner of the Enterprise of the Citizen of Lorenzo de Zavala:

William

I, Pelham Humphries, a native of the United States of the North, with due respect appear before you and say: That, attracted by the generous provisions of the Colonization Laws of this State, I have come with my family, consisting of two persons, to establish myself in the aforesaid Enterprise of His Excellency, Lorenzo de Zavala, if you should see fit, in view of the certificate I send you herewith, to admit me as a colonist, being pleased to concede to me

one league of land in the vacant tracts of said Enterprise; for which favor I shall be eternally grateful.

San Augustine, September 27, 1834.

Sign of x cross of
Pelham Humphries

Decree:

Let the interested party proceed with the accompanying certificate to the Honorable Empresario to whom it corresponds that he may report on the foregoing petition.

San Augustine, September 27, 1834.

Jorge Ant. Nixon (Paraph) Comr.

Honorable Commissioner:

I certify that the interested party is one of the colonists I have introduced in fulfillment of the contract I made with the Supreme Government of the State on March 12, 1829. Therefore, I beg of you to please grant his request and issue the order of survey to the surveyor to whom the solicited tracts are assigned.

A. Hotchkiss, Attorney-in-Fact
(Paraph)
of his Excellency, Lrenzo de Zavala
(Paraph)

Decree:

Nacogdoches, September 30, 1834.

On being presented and admitted with the accompanying documents, Surveyor Citizen Arthur Henrie shall have the survey made of the league of land the interested party may designate, provided it be entirely vacant and he shall examine the notes which are to be translated by Citizen Juan Leplicher; and proceedings shall follow later as may be most suitable. Thus I resolved and signed with two witnesses according to the law.

Jorge Ant. Nixon (Paraph) Comr.

Attendant Witness
Joseph Carriere
(Paraph)

Attendant Witness
Eligio Albarado
(Paraph)

Field.

Notes:

Honorable Commissioner:

The tract surveyed for Colonist Pelham Humphries is situated on the margin of the marsh on the west side of the Neches River, and a landmark common to the John A. Veatch and James Bullock surveys is its 1st corner, from which a post oak, 9 inches in diameter, bears south 10° west 25 3/10 varas distant. Thence south 45° west 7,111 varas were surveyed and the 2nd landmark was raised in a prairie. Thence east 7,320 varas were surveyed and the 3rd landmark was raised in a prairie. Thence north 5,218 varas were surveyed and the 4th landmark was raised in a marsh. Thence west 2,300 varas were surveyed and the 5th and last landmark was raised. Thence south 198 varas were surveyed to the 1st landmark, completing thus the league of land you ordered me to have surveyed. Of the aforesaid tract 8 labors belong to the class of arable land and the remaining 17 to that of pasture land; its configuration is that which I send you in duplicate herewith. Nacogdoches, February 14, 1835.

J. Leplicher, Translator
(Paraph)

Arthur Henrie, Surveyor
(Paraph)

THIRD SEAL

FOR THE BIENNIAL TERM OF

(SEAL)

TWO REALS

1834 AND 1835

Decree:

Town of Nacogdoches, 14th of February of 1835.

The survey of the league of land for colonist Pelham Humphries being concluded, let the corresponding title be issued, and of the two plats returned by the Surveyor, let one be added to this file of documents and the other to the testimonio, both being paraphed by me. Thus I resolved and signed with two witnesses according to law.

Jorge Ant. Nixon (Paraph) Comr.

Attendant Witness
Joseph Carriere
(Paraph)

Attendant Witness
Eligio Albarado
(Paraph)

Title of
Possession:

Citizen Jorge Antonio Nixon, Special Commissioner of the Supreme Government of the State of Coahuila and Texas for the distribution and possession of lands and the issuance of titles to the colonists in the Enterprise of His Excellency, Lorenzo de Zavala:

Whereas Pelham Humphries has been admitted as a colonist in the Colonization Enterprise contracted by the Empresario, the Most Excellent and Honorable Lorenzo de Zavala, with the Supreme Government of the State on March 12, 1829, and the aforesaid Pelham Humphries having fully established that his family consists of two persons, and finding in him the requisites prescribed by the Colonization Law of March 24, 1825: in conformity with the said law and instructions which govern me, in the name of the State I concede, to, confer upon, and put the aforesaid Pelham Humphries in real and personal possession of one league of land situated on the margin of the marsh on the west side of the Neches River, the boundaries of which are delineated on the plat and in the field notes set down by the Surveyor, Citizen Arthur Henrie, as is seen in this file of documents. Of the aforesaid tract 8 labors belong to the class of arable land and the remaining 17 to that of pasture land, which serves as classification for the sum he shall pay the State according to Article 22 of said law, conceding to him the terms it designates under the penalties therein established; he being notified that within one year he shall construct landmarks of lime and stone at each corner of the tract, that he shall settle and cultivate it in accordance with the requirements of the aforesaid law, complying scrupulously with the orders therein and elsewhere, and that he shall never convey it in mortmain.

Therefore, exercising the powers vested in me by the same law and consequent instructions, I issue the present title and order the testimonio made of it and delivered to the interested party in order that he may possess and enjoy the tract—he, his children, heirs and successors, or whoever from him or from them shall have cause or right. Given in the Town of Nacogdoches on the 14th day of the month of

February of 1835, which I sign with two attendant witnesses according to the law. Interlined—Humphries—valid: I certify.

Jorge Ant. Nixon (Paraph) Comr.

Attendant Witness
Joseph Carriere
(Paraph)

Attendant Witness
Eligio Albarado
(Paraph)

GENERAL LAND OFFICE

Austin, Texas, July 16, 1957.

I certify that the foregoing four pages contains a correct translated copy of the P.. Humphries title existing in the Spanish Archives of this office in volume 22, pages 307 through 310.

/s/ John G. Farmer
Spanish Translator.

I, J. Earl Rudder Commissioner of the General land Office of the State of Texas, do hereby certify that John G. Farmer whose signature is subscribed to the foregoing certificates, is the Spanish Translator of this office, duly qualified according to law, and that his official acts, as such, are entitled to full faith and credit.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of said office to be affixed, the day and date first above written.

/s/ J. Earl Rudder.
Commissioner

7-16-57 Pelham Humphries (21.00) Vol. 22 pp. 307-310

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(SEAL)
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Notes:

Honorable Commissioner:

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Joseph Carriere
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land, which serves as classification for the sum he shall pay the State according to Article 22 of said law, conceding to him the terms it designates under the penalties therein established; he being notified that within one year he shall construct landmarks of lime, and stone at each corner of the tract, that he shall settle and cultivate it in accordance with the requirements of the aforesaid law, complying scrupulously with the orders therein and elsewhere, and that he shall never convey it in mortmain.

Therefore, exercising the powers vested in me by the same law and consequent instructions, I issue the present title and order the testimonio made of it and delivered to the interested party in order that he may possess and enjoy the tract—he, his children, heirs and successors, or whoever from him or from them shall have cause or right. Given in the Town of Nacogdoches on the 14th day of the month of February of 1835, which I sign with two attendant witnesses according to the law. Interlined—Humphries—valid; I certify.

Jorge Ant. Nixon (Paraph) Comr.

Attendant Witness
Joseph Carriere
(Paraph)

Attendant Witness
Eligio Arbarada
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IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of said office to be affixed, the day and date first above written.

/s/ J. Earl Rudder.
Commissioner.

Finally, we respectfully say that the treaty still stands as the law of the land. We respectfully submit that the courts of Texas had no authority to change the laws of Texas. Neither does the legislature have the right to change the laws. This land could not be sold in Mortmain. The only way it could be disposed of is according to this testimonio made in order that he might possess and enjoy the tract. He, his children and successors, or whoever from him or from them shall have cause or right. Pelham Humphries nor any of his heir have ever disposed of this land in any manner whatever. Therefore, the title of the said land is still in the heirs of Pelham Humphries. We allege and charge that none of his heirs ever sold or disposed of the land in any way. The law was passed by the state of Texas but neither the state of Texas nor the legislature have the right. No judge nor any court could pass adversely to these lands. Neither could any court change the law. When Texas was admitted, it became subject to the Constitution of the United States and it could not infringe on the rights of Pelham Humphries or his descendants.

We therefore, respectfully pray that the Appellees motion be over-ruled.

In this case it has been called to the attention by Organ, Bell & Tucker, Attorneys at Law at Beaumont, Texas.

Taking exception to certain wording on page 11 in this cause, which it is said we therefore respectfully pray that the appellees motion be overruled. It is claimed by some that this is confusing. In order to clarify the allegation of this brief, we wish to say this:

"This land could not be sold in Mortmain. The only way it could be disposed of is according to this testimonio made in order that he might possess and enjoy the tract. He, his children and successors, or whoever from him or from them shall have cause or right. Pelham Humphries nor any of his heirs have ever disposed of this land in any way. The law was passed by the state of Texas but neither the state of Texas nor the legislature have the right. No judge nor any court could pass adversely to these lands. Neither could any court change the law. When Texas was admitted, it became subject to the Constitution of the United States and it could not infringe on the rights of Pelham Humphries or his descendants."

We therefore make this statement that the plea filed by the appellees in the case was based on the Statutes of Limitations included in the law books of Texas. We believe that the following case which is quoted in full here is applicable to the clarifying of this situation.

A case of Hunnicutt vs. Peyton for the defendants filed pleas of State of Limitation and is now presented here to show the suit of said Statutes in said case. Both said cases were copied here in full.

HUNNICUTT VS. PEYTON

U. S. Supreme Court, Vol. 102, Page 333.

1. Exceptions reserved at the trial of the cause may, within such time thereafter during the term as the judge shall deem reasonable, be reduced to form and presented to him for signature, and they are not waived by suing out a writ of error before his signature is obtained.
2. Where, under such circumstances, bills of exceptions are signed during the term, it is not necessary to render them effective that they be antedated, or) ordered to be filed nuc pro tunc, as of a time during the trial.
3. A party who, under article 24 of the Mexican Law of 1825, procured from the government, by purchase, a grant of public lands, could alienate it before they were selected; and his formal act of sale, with a power to his alience to

obtain the title of possession, constituted the later the absolute owner of them, when he, by the proper officer, was furnished with the evidence of title and put in possession. Where, therefore, the grant contained no specific description of the lands, but contemplated the selection and location of them, the title of extension, when given to the alience, is complete.

4. In questions of private boundary, the declaration of a deceased person of particular facts, as distinguish from reputation, is not admissible unless it be shown that he had knowledge of that whereof he spoke, and was then on the land, or in possession of it, and was pointing out and marking the boundary, or discharging some duty in relation thereto. A declaration, merely reciting something past, is within the rule which excludes hearsay evidence.

5. The decisions of the Supreme Court of Texas examined and held to be in harmony with this ruling.

6. The possession of a person who, under color of title, enters upon vacant lands, and holds adversely, is construed to include so much as is with in the boundaries of his title, and to that extent the true owner will be deemed to be disseised. But if the latter be in actual possession of any part of the lands whereon the entry is made, his constructive sesin extends to all not in fact occupied by the intruder.

ERROR to the Circuit Court of the United States for the Western District of Texas.

This was an action brought by Bailie Peyton and others against Hunnicutt and others to recover possession of a tract of land in the county of Falls, Texas, being "four leagues of land on the east of left bank of the Brazos River known as the Gregoric Basquez survey of four leagues," and more particularly described in the amended petition as being at a stake marked "P" on the east bank of the river Brazos, in the county of Falls, State of Texas, at the point where the upper line of the Austin & Williams reserve, on the east side of said river, intersect said river, running thence with said upper line of the reserve N. 71° E. 20,220 varas to a stake, and crossing Isac's Creek; thence S. 19° E. 5,000 varas to another stake for the third corner; thence S. 71° W. 18,320 varas, covering again the aforesaid creek to a stake on the Brazos River for the fourth corner; thence up said river to the place of beginning, covering an area of four leagues, fronting on said river and lying within said Austin & Williams reserve, immediately below the adjoining said upper line of said reserve.

The defendants pleaded the general issue and the Sta-

tute of Limitations. Sundry exceptions were taken during the trial. The jury returned a verdict for the plaintiffs, on which judgment was rendered. The defendant sued out this writ.

They assign for error that the court erred,—

1. In admitting the documentary evidence set out in their bill of exceptions, being certified copies of certain papers, and in holding that they vested a legal title in Jonathan C. Peyton. The copies are as follows, the Plaintiffs offering in evidence the original testimonio of their title:—

"First, A power of attorney, with power of substitution, from Gregoric Basquez to Jayme Hartz, dated the twentieth day of September, eighteen hundred and thirty-one (1831).

"Power of Attorney, with Power of Substitution, from Gregoric Basquez to Jayme Hartz.

"Second stamp—twelve reales.

"Legalized for the State of Coahuila and Texas for the years 1828, '29, '30 and '31."

"By commission: "JESUS DE LOS SANTOS COY

"In town of Nachogdoches, on the twentieth day of September, 1831, before me, the citizen Manuel de los Santos Coy, sole constitutional alcalde of the aforesaid town, and instrumental witnesses hereinafter named, besides those of my assistants with how I act agreeably to the law, appears the citizen Gregoric Basquez, of this jurisdiction, in the proper person, whom I declare to know, and who says: That by these presents he executes, gives and confers all his power, full, ample, and sufficient, whatever may be required by law and is necessary or may be of value, to Don Jayme Hartz, of this jurisdiction special, that he, in representations and use of the rights and interest which pertain to the grantor, may solicit of the person or persons authorized to what effect the possession and titles of eleven leagues of land, which he has obtained from the supreme government of the State by way of purchase, with the authority to empower his to solicit in the place or places which best suits him, together or separate, according to the tenor of the concession of the date of 11th March of this year; which I declare to have seen.

"And the grantor has placed in the hands of his attorney that he may do and perform, in the name of the grantor, all whatsoever he might do were he actually present, since for all as aforesaid, annexed, concerning, incident, and pertaining, he gives and confers the most ample and

extensive power, without any limitations whatever, and without much by default of any clause or requisite, he gives to this power all the force and effect, whatever the same may be, as if the same was herein literally written and inserted.

"That he may appoint substitutes, revoke the same and appoint others anew, with free, frank and general administration in form, since for all he relinquishes by this act whatever the law permits, and acknowledges all whatsoever his attorney may do or perform by virtue of this power of attorney, binding his person and property in every form and renounces all laws in his favor.

"In testimony whereof thus he executes, as he does not know how to write, he makes the sign of the cross; there were presents as instrumental witnesses, the citizen Martid Ybravo, Antonio Menchaca and Carlos Gil, residents of this town, and those of my assistants in the form prescribed by law, to which I certify

"Manuel De Los Santos Coy.

"Sign of the cross of_____

"Gregoric Basquez X

"Ass. witness: JESUS DE LOS SANTOS COY.

"Ass. witness: VITAL FLORES.

"This testimonio agrees with the original which remains in the archive of the public documents of this municipality, which goes truly and legally compared and corrected, and at its transcribing, correction, and comparing the same, there was found the same instrumental witness who were presents at its execution, besides those of my assistants, with whom I act in the form prescribed by law, to which I certify.

"MANUEL DE LOS SANTOS COY.

Ass. Witness: JESUS DE LOS SANTOS COY.

Ass. Witness: VITAL FLORES.

"Second, An act of sale by Gregoric Basquez to the said Jayme Hartz of his concession in sale, which had been made to him by Santiago del Valle, on the eleventh day of March, eighteen hundred and thirty-one (1831) bearing date Sept 22, eighteen hundred and thirty-one (1832).

"Act of Sale, Basquez to Hartz.

"Third stamp—two reales. (Stamp) For the years 1830 & 1831

"MOST EXCELLENT SIR—Gregoric Basquez, a native of the city of Mexico, and now in this town, with the due respect of your excellency I would represent that under-

standing the provisions of the twenty-fourth article of the colonization law of the State, of 24th March, 1825, and in virtue of being a native Mexican, with due respect to your excellency, I pray you be pleased to grant me in sale eleven leagues of land on the vacant territory of this department, with the privilege of selecting them together or separate, or in distinct places, as may suit me, with the understanding that I offer to settle and cultivate them as customary, that it may be to the purpose within the term which the law prescribes, making the payments of it value on the terms and at the places designated in the twenty-second article, and to sustain the right of the country, and of the State, and all other that may be in conformity with the laws which govern us and under their protection.

"I pray your excellency be pleased to do as aforesaid, in which I will receive favor.

"NACOGDOCHES: Sept. 28, 1830

"Gregoric Basquez.

"LEONA VICARIO: March 11, 1831.

"In conformity with the twenty-fourth article of the colonization law of 24th March, 1825, I grant by sale to the petitioner the eleven leagues of land that he solicits on the vacant territory of the State at the place that may best suit him, after the commossioner of the Supreme general gorernment shall have set apart a sufficiency of land for payment of the debt due by the State to the Federation. The commissioner for the partition of land in the enterprise to which prtain the land solicited by the petitioner, and in his default, or that the same not being embraced by any enterprise whatever, the first or sole alcalde of the respective jurisdiction will comply with the orders on the subject and put him in possession of said leagues, and issue the proper title previously classifying the quality of them; for according to their designation he shall satisfy the State, for the payment of which I concede him the times designated in the twenty-second article of the aforesaid law.

"Let a copy of his petition and this decree be given by the secretary of state, to the interested party, so that upon application with it to the commissioner it may have the desired effect.

"SANTIAGO DEL VALLE, Secretary. "LETONA."

"A copy of the original on file in the archives of the office of the secretary of state, in my charge, from whence

it was taken by orders of his excellency the governor.

"LEONA VICARIO, March 4, 1831.

"SANTIAGO D'L VALLE, SEC'Y.

Second seal—twelve reales.

"Furnished for the State of Coahuilla and Texas, for the terms 1828 and '29.

"By the commissioner,

"JESUS DE LOS SANTOS COY.

"In the town of Nacogdoches, the twenty-second day of the month of September, 1831, before me, citizen named de los Santos Coy, sole constitutional alcalde of the said town, and the instrumental witnesses, whose names appear at the end of this document, assisting me to authenticate the same in the absence of a notary appointed conformably to law, appeared the citizen Gregoric Basquez of this district, in whom I placed confidence and with whom I am personally acquainted, and said that embracing the right which the twenty-seventh article of the colonization law of the State of the 24th of March, 1825, gives the, he applies for the present order of sale by which he has sold really and publicly in fee and forever Don Jayme Hartz of this vicinity, as follows:—

"A grant of the supreme government of the State dated 11th of March, of the present year, of eleven leagues of land located on the public domain in this department, which was sold him by virtue of the twenty-fourth article.

"TREASURY DEPARTMENT, OFFICE OF COMM'R OF REVENUE.

Sept. 19, 1840

"Received of H. W. Raglin the sum of twelve hundred dollars in the promissiory notes of the government, being the amount of dues upon the within fifty labors of arable land and ten hundred and twenty-five labors of pasture lands granted to Gregoric Basquez, title dated Oct. 7, 1833, as appears from the certificate of John B. Borden, commissioner of the general land-office, now on file in the office; payment made by the Administratrix of J. C. Peyton, att'y. $1,200.—

"E. L. Stickney, Acting Comm'r of Rev.

"I, Harrison Owen, county clerk of records in and for the county of Robertson, do certify that a true copy of the within is entered on record in my office at Franklin this third day of April, A. D. 1841.

HARRISON OWEN, Co. Rec. R. C.

"Recorded in book C., pages from 110 to 125. Paid by B. Gillespie, my fees, par funds."

"Fifth, Grant or title from Luke Lessassier, alcade & c., of eleven leagues of land (including the four in controversy) to Jonathan C. Peyton, attorney of Gregoric Basquez, of date eighteen hundred and thirty-three (1833)

"Third stamp—two reales

"Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, '31, '32 & '33. Williams.

In the town of San Felipe de Austin, on the seventh day of October, 1833, I, citizen Luke Lessassier, constitutional alcalde of this town and its jurisdiction, in the exercise of the authority which has been conferred on me by the supreme government of this State, by decree dated at Leona Vicario, on the 11th March, 1831; and in consideration of the sale executed by the aforesaid supreme government in favor of Gregoric Basquez, a native of the city of Mexico, then residing in the town of Nacogdoches, of eleven leagues of land, as will appear from the superior decree of sale, dated the aforesaid Leona Vicario on the eleventh day of March, 1831, and presented by his attorney, Jonathan C. Peyton, as will be seen on pag 3 and following of this proceeding; and in attention to the superior order of his excellency the Lieutenant-governor, dated on the twenty-ninth day of January of this year and circulated by the chief department on the 19th of last February, repealing the provisional decree of the supreme government of the State in relation to those citizens to whom had been granted land not being permitted to take possession of them until the commissioner-general of the nation shall have made a reservation; and inasmuch as none of those eleven leagues applied for the interested party are at any of those points ceded to the federation by the aforesaid order and in view of the approval granted by the empresaries Messrs. Austin and Williams, written upon the first page of this proceeding, as the lands belong to the enterprise of said empresaries—in conformity with the colonization law of the State of 24th March, 1825, and in the name of the State, I confer upon and put the aforesaid attorney of the citizen Gregoric Basquez in real, virtual, personal and actual possession of eleven leagues of land, the same which he has asked for and that the government has sold to him upon the Barazo River; the situation l nes, limits, and corners of the same are delinested in the notes of survey made by the principal

scientific surveyor, Francis W. Johnson, on pages two, and following of this proceeding, with the figure thereof shown in the map hereunto annexed. The aforesaid lands, by said notes of survey, are in the opinion of the surveyor, to be of the arable class in two leagues, and of the pasture class in same leagues.

"I, the commissioner and alcalde aforesaid, in the exercise of the authority confered on me by the law, do declare, in accordance with said classification, he shall satisfy the state in the sum of one thousand two hundred dollars, according to the provision in the twenty-fourth article of the aforesaid colonization law, dated the 24th March, and is the terms designated in the twenty-second article of the same law, under the penalties therein established; being notified that within one year he shall construct permanent landmark at each angle of the land; that he shall cultivate the same in conformity with the provisions in the aforesaid law, and scrupulously comply with all ordained in it, and other enactments on the subject.

"Therefore, by virtue of the authority vested in me by the aforesaid decree of the supreme government of the state, and other orders from the same government on the subject, by the law and pursuant instructions which guide me, I issue the present title, and order that an authenticated copy be taken of it and let it be delivered to the interested party, that he may possess, use and enjoy the lands which have been sold to him, his children, heirs and successors, or whoever of him or of them may have cause, interest, or right to represent, for such is the will of the State. Given at the town of San Felipe de Austin, on the day and date above written, which I sign, with assisting witnesses, according to law.

"L. LESSASSIER.

Ass. witness: W. T. LIGHTFOOT
Ass. witness: C. C. CIVENS

II. In admitting as evidence the paper set forth in the foregoing assignment of error, in as much as they do not identify and describe and definite parcel of land.

III. In admitting the testimony of Horation Chriesman to prove by the declarations of Moore, who is now deceased, that the Basquez grant was surveyed by the latter on the reserve line or at any other particular place, such evidence being merely hearsay.

IV. In admitting his testimony, wherein he undertakes to tell what Moore told him about the location of the Austin

& Williams reserve line and the Basquez grant, particularly that Moore informed him in 1834 that he had made the survey of the said four-league Basquez grant; that the upper line of said grant begin on the east side of the Brazos River, at the point where the upper line of the reserve began; and that the upper line ran north 71 degrees east, with the reserve line, the full distance of the Basquez line; and that the upper line of the Basquez and the upper line of the reserve were the same to the extent of the Basquez line, —because there was no proof that the upper line of Austin & Williams reserve was ever in fact run, or was ever required by law, order, or decree to be run, and because there is no call in said Basquez's grant for said lines and because said witness did not state that Moore ever pointed out the place on the ground where he had run either the Basquez line of the said reserve line; and because the testimony was hearsay.

V. In admitting in evidence the following documents:—

"THE STATE OF TEXAS,
County of Falls:

"To the Honorable the District Court, in and for the County of Falls:

"In pursuance of an order made at the last of fall term of said court (D. D.., 1869), directing the undersigned surveyors to proceed and run, or make any survey necessary, and show by report to what extent, of any, the land claimed by J. C. Pool, plaintiff, and C. Jones, defendants, conflicts, and also the land claimed by Rhoda B. Huckins et als., plaintiffs conflict, if any, with the land claimed by and in possession of J. C. Pool, defendant; said land situated in Falls County, on the east margin of the Brazos River.

"In accordance with said order we, the undersigned surveyors, met on the eleventh day of November, A. D., 1869, at what is known as the Falls of the Brazos, on the east margin of said stream, and all the parties having been notified, and being present, either by themselves or attorneys, we ascertain by the calls of the A. Dela Serda grant and the field-notes of the Jose M. Sanches survey, together with a full and complete examination of lines and natural marks, the precise locality of the southern line of the said La Serda grant, it being the northern line of the said Sanches survey, and for a more particular description reference is hereby made to our accompanying plat, which is made a part of this report.

"We then proceeded to ascertain the boundaries of the

Gregoric Basquez grant, and finding that the survey or of Austin & Williams colony located the same on what is known as Austin & Williams' reserve line: after searching we found marks, corresponding in age and course, in post-oak timber, near the north end of what is known as Hog Island, after tracing said marks about fifteen miles, and finding the line to run N. 71 E., running from the Brazos River, and judging from the age of the marks and course of the line, together with the facts that after it passed the said Basquez N. E. corner it ran across, and without respect to all the known surveys of the section it passed, and there being no corner made on it, we were entirely satisfied that we were on said reserve line.

"We then ran the northern boundary of the Basquez to the east bank of the Brazos River, and found the following results:—

"That all the land claimed by said J. C. Pool is included within the boundaries of the said Basquez and the said Sanches survey, as set forth in our accompanying plat of said survey, this the 16th day of November, 1869.

"S. W. BINGHAM
"R. F. ALEXANDER
"W. S. HUNNICUTT
"J. H. COLLARD

THE STATE OF TEXAS,
County of Falls:

Personally appeared before the undersigned authority Sam W. Bingham, R. F. Alexander, W. S. Hunnicutt, and J. H. Collard, whose names are signed to the foregoing report, who after being duly sworn by me, on oath declare that said report is sure and correct in the facts therein stated, and the conclusion arrived at is true and correct, according to their opinion as scientific surveyors:

"To certify which I hereto sign my name and affix my seal of office on this sixteen day of November, 1869.

SAMUEL M. DALTON, D. C. E. G.

"To the clerk of the United States District Court for the Western District of Texas, at Austin:

ANGELINA B. EBERLY ET ALS
vs.
JAMES MARLIN et als.

"SIR,—In obedience to the commands of an order of survey issued from under your hand and seal, in your official capacity of the clerk of the District Court of the United

States for the Western District of Texas at Austin, commanding me to survey a certain tract of land containing four leagues, situated in this county, on the eastern margin of the Brazos River below the Great Falls thereof, and to ascerain the lines thereof, which land is claimed by the paintiffs to the above-entitled cause, and which order of survey issued in said cause, and which land was titled to one Gregoric Basquez, I proceed in last summer (The date not now being remembered) to search for said line, and about one mile and a half below the Great Falls of the Brazos, where on its eastern margin I found a line to start out from the river at a course of N. 68° E., in a weed-prairie, and at 9,170 varas from the river crossed Big Creek, at 20,220 varas from the river corners in prairie, strike prairie at about 12,500 varas. I then ran south 21° E., at right angles with said line at 4,870. I found another old line running S. 60° W. to the river at 17,266 varas, making a difference in the length of the two lines of 2,960 varas.

"I found the league and labor of land surveyed and located in the names of James Marlin to be entirely in conflict with the before recited survey.

In testimony whereof, I have hereunto set my hand this the 29th day of December, 1857.

W. S. HUNNICUTT

I, W. S. Hunnicutt, a dept. surveyor for Robertson's land-district, do hereby certify that the foregoing is a true and correct statement of facts to the best of my knowledge. Given under my hand and seal this 29th December, A. D. 1857.

W. S. Hunnicutt

Dept. Surveyor for Robertson's land district

To which the defendants objected on the ground, among other reasons, that they were not parties or privies to said cause.

VI. In refusing to charge the jury that the concession to Canchez authorized the owner of said concession to appropriate five leagues of the public doman and having shown an older survey than the survey by virtue of the concession to Basquez, and the said Sanchez title is the superior title for the lands covered by it.

VII. In charging the jury on the question of limitations, and in refusing to charge that, if the jury believed from the testimony that the ancestor of the defendants, Churchill Jones, entered upon that part of the John Marlin league which is in conflict with the Basquez, as claimed by the

plaintiffs, at any time before the plaintiffs or their ancestors made an entry on said Basquez, and that said defendants and their ancestors had so remained in said possession of the lnds claimed by them for three years or more before the institution of suit, then they should find favor of the defendants, Watson, Bartlet, and W. H. Jones, on heir pleas of limitation.

VIII. In refusing to charge the jury that, if they believed from the evidence that at the date of the purchase by Churchill Jones from the heirs of John Marlin in 1853, the said Jones had no notice by the county map, or other records, or otherwise, of any conflict of the John Marlin league with the Basquez grant, they should find for the defendants, Watson and Children, Bartlett and wife, and William N. Jones, even if they should find that the location as claimed by the true location of said Basquez grant.

IX. In rendering judgment on the verdict of the jury, because the same is indefinite, uncertain, and does not find the main issue in the case; viz., how much of the defendants' land, if any, is covered by the plaintiffs grant.

The charge of the jury complained of in the seventh assignment of error is set forth in the opinion of the Court.

Mr. Levi W. Goodrich and Mr. Matthew H. Carpenter for the plaintiffs in error.

The papers admitted by the court below, if evidence at all; show legal title in Basquez. The right asserted by the plaintiffs is, therefore, cognizable only in a court of equity. The concession and the final extension of his title were to him, and no deed appears from him Hanrick V. Barton, 16 Wall. 166; Sheirburn V. Cordova et al., 24 Row. 423.

It is certainly the duty of the surveyor to run around the land intended to be embraced the survey and patent, and see that such objects are designated on it as will clearly point out and identify the boundaries of the tract, and to extend a correct description of these objects, natural or artificial, into the field-notes of the survey, in order that they may be inserted in the patent, so the owner, as well as v. Lessee, 3 Pet. 92; Henshaw v. other locators, may have the means of knowing precisely what land is Bisell, 18 Wall. 255; Deery v. Cray, 10 id. 263; Boadman v. Reed, 6 Pet. granted. If the lands cannot be identified by the calls in the grant, 328; Gailbeam v. Mays, 15 Tex. 414; Booth v. Strippleman, 26 id, 440; it is void. Chinowith V. Haskell's, Stafford V. King, 30 id. 269; Phillips V. Ayres, 45 id. 605;

Bartless v. Hubert, 21 id. 20; Norris v. Hunt, 51 id. 609; Anderson v. Stamp, 19 id. 460; Beeth v Upsher, 26 id, 69; Hubert v. Bartless, 9 id, 102; Muller v. Landa, 31 id, 265; Welder v. Carroll, 29 id. 317; Williamson v. Simpson, 16 id. 439; Shipp v. Miler, 2 Wheat, 316; Johnson v. Paunel's Heirs, id. 206; Bruckner v. Lawrence, 2 Doug. (Mich.) 19.

The concession authorizing the appropriation of eleven leagues was sufficient authority to the local officer to sever that quantity from the vacant public domain, and put Basquez in possession of the land so appropriated. When this is done, the floating right, evidenced by the concession, attached to a certain specified attached to a certain specified locality, and the title is complete, Graham v. United States, 4 Wall. 259; Hanrick v. Barton, 16 id. 166.

The charge to the jury set forth in the sixth assignment of error should have been granted. Hollingworth v. Holshausen, 17 Tex. 44; Warren v. Sherman, 54 id. 441; Landes v. Brant, 10 How. 348; Miller v. Dale, 92 U. S. 473; Henshaw v. Bessel, 18 Wall. 255.

The testimony of the witness Chriesman was hearsay, and should not have been admitted. Shuttle v. Thompson, 15 Wall. 151; Adams v. Swanson, 116 Mass, 595; Long v. Colton id. 414; Hall v. Mayo, 97 id. 416.

The question as to the competency of hearsay testimony to establish boundaries has often been judicially considered in Texas. Where a corner or marked line has been pointed out to the witness by a deceased person, who is shown to be in a position to have a knowledge of the facts, the parol declaration has been received; and where it appeared that the surveys in question was one of a block of surveys, or was surveyed at the same time by the same surveyor, the plat he made, or his field-notes of surrounding or contiguous surveys, have been received to illustrate and identify the lined of the survey in question. The Supreme Court of that State has not in any instance gone beyond the rule as above stated. George v. Thomas, 16 Tex. 74; Stroud v. Springfield, 28 id. 649; Welder v. Carroll, 29 id. 317; Evans v. Hurt, 34 id. 111; Smith v. Russell, 37 id. 247; Hurt v Evans, 49 id. 311.

The objections to Chriseman's testimony may be summed up as follows:—

Moore, whose declarations were received, was not shown by evidence aliunde to be in a position to have a knowledge of the facts to which his declarations relate. No line or corner, visible or imaginary, was pointed out to the

witness, and he says that he never saw any. The statement testified to by him is not a declaration, but a narration of the particular facts of a then past occurrence. It does not appear that primary or direct evidence of the location of the lines and corners of the Basquez tract cannot be produced by the Plaintiffs. If the evidence tends to prove any fact, it is that an actual survey was made, and not where the lines or corners were placed; and it does not appear therefrom that the land so surveyed by Moore was or is embraced in the title under which the plaintiffs claim. It is attempted by said testimony to repudiate the description in the grant, and to locate the land claimed under the same by adding to, varying or contradicting the instrument itself. It does not appear that by proper search a tract of land cannot be found corresponding in description with every call in the plaintiffs tile.

When there is only a partial conflict or interference of surveys, the statutes will not run in favor of an adverse occupant under a junior title, if his possession does not extend to the part of the land in dispute which is within the conflict. Angell, Lim., sect. 402, and numerous authorities in notes; Trimble v. Smith, 4 Bibb (My.) 257; Fox v. Hinton, id 559; White v. Burney, 20 How. 235; Role v. Rittenhouse, 25 Pa. St. 491. The possession which the owner of the junior title has of that part of the land not within the interference, being lawful within itself, is not, by construction, extended also to a presumed unlawful trespass upon that part embraced within the elder title. For this purpose there must be an actual, visible and exclusive adverse possession of the land in controversy. Wheeler v. Moody, 9 Tex. 377; Gillespie v. Jones, 26 id. 346; Whitehead v. Foley, 28 id. 268. Such possession, if not continuous for the full term limited by the statute, is insufficient, whether it be lost by voluntary set of the party, or by his forcible ouster, or by a final judgment against him in a suit brought to recover the estate. Shields v. Boone, 22 Tex. 193.

Mr. Samuel R. Fisher and Mr. Phillip Philips, contra.

In Hanrick v. Barton (16 Wall. 166), relied on by the plaintiff in error in support of their proposition that Peyton's title was an equitable and not a legal one, there was not, as in this case, a deed from the original grantee.

If, as there held, a power of attorney from La Serda to Roberts authorizing him to sell, and a substitution by Roberts of Williams, and a sale by the latter, passed a legal

title, surely a sale from Basquez to Hartz, and from the latter to Peyton, passed a legal title.

But by what law or test is the title of Peyton to be adjudged an equitable one: Equitable and legal titles are found upon the distinction between equitable and legal estated, and there cannot be an equitable estate or title in one, without a correspondence legal estate or title in another. In other words, there must be a trustee in whom the fee is vested, and a beneficiary or cestui que trust.

In the cast at bar, where and in whom is the fee or legal estate? Where and in whom is the equitable estate? And how was the trust created?

The fee and absolute title were vested in Basquez, with the power of disposing of it when the concession was made. All the estate and interest of the government were conveyed. Hancock v. McKinney, 7 Tex. 384; Martin v. Parker, 26 id. 253.

The fee, then, is not in the government nor in him; for if it passed to him, and he having the power to do so, disposed of it in express terms by his act of sale it can only be in the vendes. There is no room for a trust. The estate, expressly limited in terms by the act of sale or deed from Basquez, is an estate in fee; for he there declares "that he has sold, really, publicly, and in fee and for ever, &c".

At the time of the acquisition of Peyton's title, as noted by the Supreme Court of Texas in Marlin v. Parker (supra), the common law distinction between legal and equitable titles did not obtain.

The case at bar does not involve the question of remedy. The question is one of estate, and must be determined by the law in force when the title was acquired. Steinback v. Stewart, 11 Wall. 576; Hanrick v. Barton, supra; Robinson v. Campbell, 3 Wheat. 212.

The difference between a Mexican concession or grant by sale, and a patent from the United States or a State, as noted in Hanrick v. Barton, is too obvious for comment.

The grant to Basquez being the primary title, and the extension to the land but the incident, the extension when made related to the grant and vested in Peyton the absolute title in fee, even if it did not, as we contend, pass when the grant was made.

Peyton stands in privity with Basquez, who initiated the proceedings, and taught the extension of title is not

to be analogized to a patent, still if necessary, the doctrine of estoped and relation may be invoked.

If applied for the purpose of justice in the case of a patent, where the fees resides in the government until the patent issues, it certainly should apply to a case where the government parts with all its title when a grant is made. Barry v. Gratz 4 Wheat. 213; Stoddard v. Chambers, 2, How. 284; Landes v. Brant, 10 id. 348; Bean v Welsh, 17 Ala. 770; Dickerson v. Talbot, 14 B Mon. (Ky) 60; Cavender v. Smith, 5 Iowa, 157; Irvine v. Irvine, 9 Wall. 617; Langdeau v. Hanes 21 id. 521; McCarthy v. Mann, 19 id. 20.

The genuineness of Peyton's title was admitted; possession had been held under it for nearly twenty years, with payment of taxes. The plaintiff below stood ready to prove, and did prove to the satisfaction of the jury, its actual survey and identify on the ground. The presumption was that the survey had been made, and it was incumbent on the defendants to repel it. Phillips v. Ayers, 45 Tex. 601; Jenkins v. Chambers, 9 id. 167; Booth v. Strippleman, 26 id 436. The action of the alcalde in extending title on the survey is not to be examined with hupercirítical spirit. Hancock v. McKinney, 7 id. 384; Hancock v. Horten, 11 id. 220.

There is no patent ambiquity in the grant, but the court erroneously held that an actual survey was necessary to its validity. Stafford v. King, 30 Tex. 537; Jones v. Burgett, 26 id. 284; Newton v. Pryor, 7 Wheat., 7.

No case in Texas or elsewhere can be produced where a grant of this character, containing a specific description of the granted premises, has been held absolutely void upon an objection in limine.

To have so held in this case would have been confiscation under the guise of construction. It is not necessary that the grant itself should contain such a description as will, without the aid of extrinsic testimony, ascertain precisely what is conveyed. If by such testimony it can be located, it should not be held absolutely void for uncertainty. Blake v. Doherty, 5 Wheat, 359; Cavasos v. Trevino, 6 Wall. 773; Ragsdale v. Robinson, 48 Tex. 379; Williamson v. Simpson, 16 id. 433; Philip v. Ayers, 45 id. 601; Johns v. Shutz, 47 id., 578; Booth v. Strippleman, 26 id. 436; Kingston v. Pickens, 46 id. 99; Jones v. Burgett id. 284; Lohff v. Germer, 37 id. 578; Browning v. Atkinson, id 633; Stafford v. King 30 id. 257; Bass v. Mitchell, 22 id. 285; Mitchell v. Burdett, id 633; Bolton v. Lann 16 id. 96; Urquhart v. Burleson, 6 id. 502.

The testimony of the witness Chriesman was clearly admissible. The Supreme Court of Texas has in a current of decisions commencing in 1856, and continuing down to the present day, held that reputation is admissible as evidence in questions of private boundary; and has given to the unsupported declarations of a deceased person, as to where a line or corner is, the weight of common reputation; and permitted such declarations to be proved under the rule that in questions of boundary hearsay is evidence. George v. Thomas, 16 Tex. 74, Stroud v. Springfield 28 id. 649; Welder v. Carroll, 29 id. 318; Wheeler v. Hunt, 34 id. 47 Smith v. Russell, 37 id. 247; Evans v Hurt, id. 111; Hurt v. Evans 49 id. 311.

In Stroud v. Springfield, the following cases are cited and approved; Speer v. Coste, 3 McCord (S. C.) 227; Blythe v. Sutherland, id. 258; Broadman v. Reed, 6 Pet. 328; Shutte v. Thompson, 15 Wall. 151.

The rule established by these decisions has become so firmly engrafted upon the laws of Texas as to become a rule of property.

It has also been adopted by many other States. Tate v. Southered, 1 Hawks (N. C.), 45; Shepherd v. Thompson, 4 N. H. 213; 49 id. 230; Powers v. Selsby, 41 Vt. 289; Higby v. Bidell, 9 Conn. 447.

Where the rules of evidence established by statute of by the decisions of the highest tribunal of a State become a rule of Property, more especially in matters of real estate, they will be followed by the courts of the United States. Waring v. Jackson, 1 Pet. 570; Hinde v. Vattier, 5 id. 398; Henderson v. Griffin, id. 151; Rolks Lesee v. Wendell, 5 Wheat. 293; Jackson v. Chaw, 12 id. 143; Olcott v. Bynum, 17 Wall. 44; Lloyd v. Fulton, 91 U. S. 479; Lamborn v. County Commissioner 97 id. 181; Crivis v. Powell, 98 id. 176.

Mr. Justice Strong delivered the opinion of the court.

This is an act of ejectment brought to recover possession of four leagues of land on the east band of the Brazos River, known as the Gregoric Basquez survey of four leagues. The defense set up against the claims of the plaintiffs was the general issue by which the title of the Plaintiffs was denied. As also the wrongful entry of the defendants. The Statutes of Limitations was also pleaded.

At the trial in the Circuit Court a verdict was obtained by the Plaintiffs, upon which a judgment was entered, and the defendants have brought the case here, assigning several errors to the rulings in the lower court.

Before proceeding to examine them, it is necessary to notice an objection interposed by the plaintiffs against their being considered at all.

Tle verdict was rendered on the 17th of February, 1877, and the judgment thereon was entered on the same day. On the 19th of the same month the defendants moved for a new trial. This motion was overruled on the 20th. Two days afterwards (on the 24th) the writ of error was sued out, tested on that day. It does not appear when the writ was filed or served. A citation was also issued on the 24th of February and returned by the marshall, received in his office September 3, and served the same day.

The defendant's bills of exceptions upon which their assignments of error are founded were signed by the judge on the 28th of eFbruary, and filed in the cause on the 1st of March next following. This was during the term at which the cause was tried, but eleven days after the verdict was rendered. The plaintiff's counsel was present when the bills were signed, and objected on the ground that they were not presented for signature within the time limited by the rule of the court. That rule was as follows: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial unless further time be allowed by the court." No objection was made to the correctness of the bills or to their signature because a writ of error had been sued out.

On the 1st of March an order was made by the court extending the time for presenting and filing the bills until that day (the plaintiffs objecting to the order), and accordingly the bills were then filed.

It is now insisted that the bills of exceptions cannot be considered a part of the record, and that they are not properly here for review. For this several reasons are advanced, the first of which is that the presentation to the judge was not in the time prescribed by the rule of this court. But the rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action. He may depart from it in order to effactuate justice. Stanton v. Enbrey, 93, U. S. 438. It is a direction to the parties, and it expressly reserves the power to enlarge the time. It is no doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, "for a testimony," may be afterwards, during the term. In prac-

tice it is not usual to reduce bills of exception from and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. United States v. Breitling, 20 How. 252; Stanton v. Embrey, supra; Dredge v. Foreyth, 2 Black, 564. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It may depend much upon the nature of the bills. Some require much more time for preparations than others. It is true a judge cannot be permitted to make up a statement of facts, after the writ of error is issued, upon which the case shall be heard. Generee v. Bonnener, 7 Wall. 564. That is quite a different matter. But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case: it is merely verifying the case as it appeared on trial.

It is further urged by the plaintiffs that the defendants waived their exceptions by suing out the writ of error before the signature of the judge was obtained. In support of this objection we referred to Tidd's Practice, 863; where it is said, "If a party who at the trial of a cause has tendered a bill of exceptions, being writ of error before he has procured the judge's signature to such bill, he thereby waives the bill of exceptions, and will not be permitted by the court of error afterwards to tack or append the bill of exceptions to the writ of error." 4th Am. ed., from the 9th London. For this the author relies on Dillon v. Cos. dem. Parker, 1 Bing. 17 S. C. 11 Price. 100. In that case a year had elapsed after the writ of error had issued. The transcript of the record had gone into the Court of Errors. The common assignments of errors had been made and issue had been joined before the plaintiffs in error moved the court in error to compel a settlement of the bill in the lower court, and asked that it might be appended to the writ. In response to this motion, it was observed by two of the justices that the proper course would be to apply to the inferior court (the Court of King's Bench), which might, perhaps, make such an order, and then the bill of excep-

tions might be brought up by allegation of diminution. The case cited hardly sustains the text. Only one of the judges expressed the opinion that the writ of error and the return of the record were a waiver of the bill of exceptions. But if that is the rule in the English courts, it is not imperative even there. Where the presentation to the judge has been delayed form the default of the defendant in error, or for others sufficient reasons, the Court of Errors will allow the bill or exceptions, when signed, to be tacked to the record as of the time when the record was removed Taylor v. Williams, 2 Barn, & Adol. 845; S. C. 6 Bing 512. The case is also reported in 4 Moo. & P. 257, where the facts are fully stated. On the trial before Chief Justice Tindal, on the 23rd of Dec. a bill of exceptions was tendered, the substance of which was reduced to writing and given to the officer of the court before the termination of the cause, but it was not then signed and sealed. There was a verdict for the plaintiff, the defendant sued out a writ of error in the King's Bench. Subsequently, on the 11th of February following, the bill of exceptions in and amended form was settled by the counsel for the parties, and a copy was sent to the plaintiff's attorney that he might accede to its terms, or suggest alterations before it was sealed by the Chief Justice. At the same time, the defendant served a rule to transcribe the record for return with the writ of error. The bill not having been returned, the Court granted an order for its return. It was argued against the rule (and Dillon v. Parker was cited in support of error and the rule to transcribe, the record had been removed into the King's Bench. But the court, all the judges concurring, retained the order upon the attorney, holding that the Chief Justice might seal the bill. It is not, therefore, by any means settled, even in England, that suing out a writ of error is a waiver of unsigned bills of exceptions.

We know of no decision in this country that asserts or gives any countenance to such rule, or any reason that justifies it unless it be one in New York, to which we shall refer. True a writ of error here, as in England, is supposed to remove the record of the court to which it is directed into the superior tribunal. But this is a mere fiction. In neither country is the record itself actually sent up. A transcript only is sent. In England, at common law, a writ of error operated as a suppersedas and stayed all action of the inferior court, and thence it was regarded as removing the record and ousting the jurisdiction of that court. The law there has been changed. And here, the writ is of

itself no supersedeas. If there be no bail for a supersedeas, a writ does not stay the action of the trial court. An execution may be issued and executed though a writ of error is pending. Much more, it would seem, must the court to which the writ is sent have power, during the term in which the case is tried, to put the records and proceedings in form to return them in obedience to the writ. If that cannot be done, grant hardship and injustice would in many cases be the results. As we have said, bills of exceptions cannot always be formally prepared until a considerable time after verdict and judgment. They may require in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charge of the judges, to which exceptions has been taken, may not have been filed, or sickness may have interferred. Meanwhile, judgment on the verdict may have been engered, and unless the party can protect himself by a writ of error, and execution may follow. For these reasons, the universal practice is to give reasonable time to make the bills of exceptions and obtain the signature. This is not altering the record, it is completing it. It is not exercising jurisdiction over the case. It is merely putting into form the record statement of what was done before the writ of error was sent down. In Brown v. Bissell (1 Doug 1. Mich.) 273. where a bill of exception returned with a writ of error appeared to have been signed after the writ was sued out, it was held to be, at most, whether at common law or under the statute a mere irregularity, which was waived by a joiner in errors. Witback v. Waine. 8 How (N. Y.) Pr. 433.

The remaining objection to the bills of exceptions is that they were not signed nor filed nuc pro tunc, but that they appear on their face to have been signed and filed ten days after the trial. We think, however, the absence of any order that the bills should have the same effect as if had they been signed and filed during the trial is not a fatal objections. The order of March 1, extending the time for signing and filing, is equivalent to such an order. And the fact that the date of the signature was the 28th of February is of no practical importance. At most it is only an irregularity. It is not a void act. Perhaps the bills would appear more regular had they been dated February 17, but they are recitals of what occurred at the trial and they show that the exceptions were then taken—taken in time. If it be kept in mind that the judge's signature is required only for "testimony" that the execution was taken at the trial,

and before verdict, it cannot be material that the testimony was given after the close of the trial, if given during the term. We do not overlook what was said in Walton v. United State. Wheat. 651. We gather facts of that case only from the opinion of the court, delivered by Mr. Justice Duval, by which it appears that the bill of exceptions did not show that any exception was taken at the trial. That of course, was a fatal defect. But, after having noticed that fact, he made some general observations. After stating that it will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty, and that it may afterwards, during the term, according to the rules of court, be reduced to form and signed by the judge, he added. But in all those cases the bill of exceptions is signed nunc pro tunc, and it purports on its face to be the same as if actually reduced to form and signed pending the trial. And, he said, "it would be fatal defect if it were to appear otherwise; for the original authority under which bills of exceptions are allowed, has always been considered to be restricted to matters of exceptions taken pending the trial and ascertain before the verdict."

These remarks were not necessary to the decision of the case, and they are unsustained by any authority, so far as we know, that existed when they were made. In Ex parte Bradstreet (Pet. 102), Mr. Chief Justice Marshall said, a practice to sign a bill of exceptions after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term allowing such a period to prepare it. No intimation was given that the signature must be nunc pro tunc.

Walton v. United States was referred to in Law v Merrills (6 Wend. (N. Y.) 268), by one of the judges, and the language of Mr. Justice Duvall quoted, but it was unnecessary to decision of that case. The bill there had been signed a year after trial, by a judge who had not tried the cause. We find no case which can be regarded as an authoritative decision that a bill of exceptions, signed during the term at which a trial took place, though after the close of the trial, must be antendated to make it effective, or ordered to be filed nunc pro tunc as of time during the trial. Nor can we discover any reason for such a requirement. During the term the records of the term are before the court for amendment in matters of form, and whether a bill was signed as of a date after judgment if during the term, or antendated to a time during the trial, is a question of form only, if it appears that the exceptions were in fact taken before ver-

dict and during the progress of the trial. Confessedly it may be signed after judgment, as of a date before, and be effective, though the date of the signature in such a case is false. Why should giving to the signature its true date destroy it. The reason why it is required that a bill shall be presented for signature during the term (except in extraordinary cases, when delay is allowed by the judge,) is that the facts appearing and rulings made at the trial may be fresh in memory. Are they any more fresh in his memory when he antedates the bill, or orders it to be filed as of the date of the trial, then when he gives to the signature and filing their true date? We cannot doube that in a multitude of cases bills of exceptions have been signed after judgment, and filed without any order that the signature and filing entered nunc pro tunc, but when the true time of the signature appeared have been treated as sufficient, whenever they have shown that exceptions were taken during the trial. And we think, it would be a surprise to the profession, and work great wrong to suitors, were we to hold such bills invalid.

In Neece v. Haley (23 Ill. 416), exceptions were duly taken at the trial. The record showed that the bill of exceptions was signed three days afterwards, but during the term. It was held that the bill was good and that the record need not explain the delay.

So it was ruled in Illinois Railroad Co. v. Palmer (24 id. 43), that, if the bill of exceptions clearly shows that exception were taken at the proper time, it is immaterial that it was not signed till some days after the trial, and that it spoke in the present tense.

In Dean v. Gridley (10 Wend. (N. Y.) 254), Savage, C. J., declared that it was not required the bill should be so drawn as to appear to have been signed upon the trial, whether it was so or not. He was speaking of the Supreme Court of Errors. See Hallowell v. Hallowell, 1 mon. (Ky) 130; Hughes v. Robertson, id. 215.

We pass, then, to a consideration of the assignments of error. The first raises the question whether the title which was set up in Jonathan Peyton was a legal one or merely an equity. As set out in the several bills of exceptions, it appears to have been as follows: On the 28th of September, 1830, Gregoric Basquez applied to the proper authorities of the Mexican government for a great in sale of eleven leagues of vacant land in the department wherein Nacogdoches was situated, with the privilege of selecting them together, or separate, or in distant places.

On the 11th of March next following, a concession was made in accordance with the prayer of the petition, and an order given to the commissioner for the partition of land, or to the alcalde of the jurisdiction to put the petitioner into possession of the subject to the grant.

On the 20th of September, 1831, Basquez a power of attorney to Don Jayme Hartz, empowering him to solicity the possession and titles to the said eleven leagues, in the place or places which best suited him (Hartz) together or separate and empowering him also to appoint substitutes.

Two days afterwards Basquez sold and conveyed the grant for the sum of $150 to Don Jayme Hartz in fee.

On the 2d of March, 1882, Hartz, in consideration of $500 in him paid, sold the concession or grant to Jonathan Peyton, the ancestor of recited the conveyance of Basquez to the vendor.

On the 7th of October 1833, the constitutional alclade, by a legalized act, conferred upon and put Peyton, at the aforesaid attorney of Basquez, "in real, virtual, personal, and actual possssion of the eleven leagues." The same which had been granted to Basquez, describing them by the situation, lines, limits, and corners as delineated in the notes of survey made by Francis W. Johnson, the principal surveyor, on pages two and following of the proceeding, with the figures thereof shown in the map thereunto annexed. The act of the alcalde ordered that an authenticated copy of it should be delivered to the interested party that he might possess, use and enjoy the lands sold to him, his children, heirs and successors, or whoever of him or them might have cause, interest, or right to represent.

We are unable to see why these proceedings did not vest the legal title to the lands granted in Peyton. The possession was delivered to him, and he was instituted therein. The interest of Basquez, whaever it was, both legal and equitable, had been sold by him to Hartz, and Hartz had sold it to Peyton. The institution into possession must, therefore, have insured to the benefit of Peyton. It is a mistake to allege, as the defendants now do, that the final extension was to Basquez. It may be that Peyton would have held the land for the use of Basquez, had he been only the attorney of Basquez. But he was more. He was granted of all the Basquez right. In this particular the case is unlike Hanrick v. Barton, 16 Wall. 166. In that case, as here, there had been an extension of the possession to the attorney in fact of the original grantee of the government, and it was held that the extension insured to his benefit, and that its legal effect was

to perfect title in him. But there has been no grant of the original title to the attorney. An assertion of title in him, was, therefore a fraud upon his principal. But this court said: "We do not mean to say that the original grantee, if not prohibited by law, might not have assigned his inchoate title to a third person, nor that the title might not, by a grant in proper forms, have been perfected in such assignee."

It has repeatedly been decided in Texas that purchasers under the twenty-fourth article of Mexican law of 1825, can alinate their grants as soon as the concession has been made to them, before the land was selected, or the title of possession was issued. Ryan v. Jackson, 11 Tex. 391; Clay v Holbert, 14 id. 189. In Martin v. Parker (26 id. 254.) It was held that a formal act of sale by the original grantee, with a power to the purchaser to obtain the title of possession, must be held to constitute the purchaser the absolute owner of the property when he is put into possession of the land, and the evidence of title by the proper officer of the government. Such is this case. The first assignment of error, therefore, cannot be sustained.

Nor can the second. The original grant, it is true, did not locate the subject of the grant. It is contemplated a selection and location thereafter, and, when these were made, as the jury found, and the title of extension was given, the title was complete. There was enough in the extension, coupled with the notes of the surveyor (made a part of it) to enable the location to be identified. A more important question is raised by the third and fourth assignments.

It was a very material inquiry at the trial, where the Basquez four leagues had been located. The title-paper described the location as beginning at a stake marked P, upon the left margin of the river Brazos, running thence North 71 degrees east, to a corner; thence by other courses back to the river, and thence up the river to the place of beginning. Such was the report of the survey. The starting point was a stake, perishable, of course, which, as might have been expected, would not be found after a lapse of forty years. But the survey was not a mere chamber one. There was evidence that it had actually been made upon the ground, and the court submitted to the jury to find whether it has or has not. No exception was taken to this submission, and the jury found that an actual survey had been thus made. Its location was the matter chiefly in controversy. The claim of the plaintiffs was that its upper or north line, described as beginning at a stake marked P on the left bank of the Brazos River, running thence by a course North 71

degrees east, was the upper line of the Austin & Williams reserve, and identical with it to the extent of the Banquez survey. To prove this they introduced the testimony of Heratic Chriesman, against the objection of the defendants. Chriesman had been a surveyor under F. W. Johnson principal surveyor of the Austin & Williams lands in the reserve, and Williams Moore, deceased, had been another deputy. The two deputies, in 1833 and 1834, had been engaged in surveying in the reserve other lots on the left side of the Brazos River. Neither of them was on the Basquez tract, or on any line of it. Chriesman was laying out tracts fronting one thousand varas on the river. By direction of Johnson. These surveys were to include all the river-front between the upper line of the Ruiz (a grant located on the lower of the reserve) and the lower line of the Basquez four-leagues grant. Moore was surveying in the rear, during the time that Moore and the witness were thus engaged surveying in the reserve, and perhaps before that time, as he testified, he was allowed to state that Moore informed him that he had made the survey of the Basquez four-league tract; and that the upper line of said grant began on the east bank of the Brazos River, at the point where the upper line of the Basquez ran north 71 degrees east with the reserve line the full distance of the Basquez line, and that the upper line of the Basquez and the upper line of the reserve were the same to the extent of the Basquez line. It was this testimony, and other of a similar nature, to which the defendant objected, and to the admission of which they expected.

It is to be noticed that the witness himself, as he expressly stated had no knowledge of the location of lines of the Basquez survey, except what Moore had told him. The declarations of Moore were made, not when he was pointing out the boundaries of the Basquez survey, but when he was at a distance from the place of beginning of that survey and from its upper line. That Moore had made the survey, or even been upon its upper line, or on the upper line of the reserve, is proved only by his assertion, which the court allowed to be given in evidence. There was no such proof aliunde. Whether he had any knowledge of the facts whereof he spoke to Chriesman, is known only from his own statement.

Again, Moore's declarations had no reference to reputation in the neighborhood. They are not to be confounded with proof of reputation,—proof of what the community thought, believed, or said. As repeated by the witness, they were mere hearsay, the unsworn declarations of a deceased

person respecting a particular fact not of public nature. We do not question that such declarations of reputation respecting ancient public boundaries are admissible, and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a limited class of cases,—a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof of reputation is open to rebuttal by witnessed. Not so with declarations of a particular facts respecting a private boundary. They are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the regestae.

In Ellicott et al. v. Pearl (10 Pet. 412), we find a case which bears strangely on the present. In that case, which was a writ of right for a tract of land, in which the location of a survey was a matter in controversy, a witness was offered to prove that one Moore, who was dead, but whose name was put down as one of the chain-carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor when the original survey was made and the line was run for that survey. The evidence was rejected; and, this court ruled, correctly rejected, though the declarations offered were made by one who was proved by other evidence to have assisted in running the line. This case is instructive, and we believe it is in harmony with the rule generally enforced in this country. It certainly is in accord with the ruling of the English courts.

It is true that in several States of the Union decisions have been made recognizing the admissibility of declarations of deceased persons, even though they were statements of particular facts and in regard to mere private boundaries; but many of them, perhaps most of them, were admissible on other grounds, either as parts of the res gestae or declarations of parties in possession. We think such is not the preponderant weight of decision. In Massachusetts, where the subject has been much discussed, it is held that, to be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries, Bartkett v. Emerson, 7 Gray (Mass.), 174; Daggett v Shaw, 5 Mete, (Mass.) 223, and again, in Long v. Colton (116 Mass. 414), when it was said that it is an element not to be disregarded, especially where the question is one of private boundaries, that the declaration was made while in the act of pointing out the boundaries, on the de-

calrant's land. The declaration derives its force from the fact that it accompanies and qualifies an act, and is thus a part of the act. A similar ruling was made in Bender v. Pitzer, 27 Pa. St. 333.

We will not undertake to review the vast number of decisions of State courts upon this subject. It would greatly protract this opinion. Some things may be deduced from them, which, though not universally recognize, are the conclusions to which, we think, a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons who, it is shown, had knowledge of that whereof they spoke, and who were on the land, or in possession of it when the declarations were made.

To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excluded hearsay evidence. Still if a different ruling has been made in the State of Texas, and has become a rule of properly there, applicable to the determination of controversies respecting disputed boundaries, we should feel constrained to apply the Texas rule to this case. We, have, therefore, carefully examined all the decisions of the Supreme Court of that State which relate to the subject. The results has been to convince us that there is no essential difference between the rule as there held and the general rules held by the American courts. Hearsay evidence is admitted in questions of boundary to establish old boundary lines, even when private; but it is under restrictions, and the restrictions appear to be the same as these which are recognized elsewhere.

The first case is George v. Thomas, 16 Tex. 74. What was there ruled was that the declarations of a public surveyor, made while he was making the survey to establish the dividing line, were admissible. They were a part of the res gestae. This is the leading case to which the later cases refer, and upon which they are generally rested. The opinion cites Blythe v. Sutherland, 3 McCord (S.C.), 258. In that case the declarations of a deceased surveyor, who was proved by a witness to have run the line originally, were admitted in evidence. But they declaration made while the surveyor was pointing out the line and showing the monuments. Stroud v. Springfield (28 Tex. 649) goes farther. The evidence offered in that case was rejected. The court, however,

referred to Speer v. Coats (3 McCord S. C.), 227), where the court had said in reference to the declarations of a deceased chain-carrier who had pointed out to the witness a corner tree of the survey, "it cannot be doubted at this day that the declarations of deceased persons who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence." Even this was not declared to be an accepted rule in Texas, though the chain-carrier who aided in the survey had actually pointed out a corner.

The next case is Welder v. Carroll, 29 Tex. 317. It decided nothing more than was ruled in the former case. Indeed, while the court said, "If the locality of a boundary line can be proved by witnesses, who can, from their personal knowledge, or on information derived from general reputation, or from its having been pointed out to them by the surveyor by whom it was run, or others who were present at the time, or cognizant of the fact, it will fix and mark its position." But at the same time the court rejected the deposition of a witness tending to prove the locality of the line from information given him by a surveyor, remarking that while, as heretofore held by this court, hearsay evidence to establish ancient boundaries is, under proper circumstances, admissible, it should be closely scrutinized and received with proper caution. And it was held that the evidence was much too vague and uncertain in respect to the locality of the line of which the witness spoke, as well as in respect to the source of his information, and the time and circumstances under which he acquired it.

The next case is Evans v. Hurt and Others, 34 id. 111. It decides that declarations of a former owner, since deceased, who, while in possession of and claiming the land, pointed out his corner and line to the deposing witness, are evidence of the boundary in behalf of the parties claiming under him. This is the rule as held in other states. The court also decided that the declarations of a son of a former owner who pointed out the disputed line to the witness were inadmissible; but the case does not show what they were, nor under what circumstances they were made. This case came again before the court, and it is reported in 49 id. 311. The report, however, contains nothing more definite than what appears in 34 Texas.

The only other case which we have found or to which we have been referred to is Smith v. Russell, 37 id. 247. In that case it appeared that the lower court had admitted, the defendants to prove that one of the original chain-bearers,

who was dead at the time of the trial, had pointed out to the witness the place of the corner. The Supreme Court held that the evidence was properly admitted, with the general mark that the declarations of deceased witnesses may be proved to fix the location of corners and lines. Citing Stroud v. Springfield and Welder v. Carroll. From a review of all of these cases it is quite obvious that the rule in Texas is not different from that which we have endeavored to show is the general American rule, the guarded rule we have heretofore stated.

Our conclusion, therefore, is that the fourth and fifth assignments of error must be sustained, and that the answer of Chriesman to the fourth, ninth and nineteenth interrogatories, as well as all the declarations of Moore, were erroneously received.

We discover no error in the admission of the evidence set out in the fourth bill of exceptions. The documents were certainly evidence against one of the defendants.

Nor can the sixth assignment of error be sustained. The survey made under the Sanchez concession was not the completion of this title. It did not identify the subject of the concession until it was accepted by the government, and until the title of possession was given. That was issued Oct. 19, 1833, after the Basquez concession had been consumated.

The seventh assignment relates to the charge given to the jury respecting the Statute of Limitations. To understand that it is necessary to refer to some of the facts that appeared in evidence. It appeared that in 1835 John Marlin, as a colonist, obtained a complete grant from the Mexican Government of one league, part of which interferred with the Basquez four leagues tract. It appeared also that the defendants, Watson and his children, Bartless and his wife, and W. H. Jones having shown title in themselves to the several tracts they claimed, by regular transfer from the sovereignty of the soil, gave evidence tending to show that their ancestor, Churchill Jones, in 1855, took actual possession of that part of the Marlin league which interferred with the Basquez grant, built a mill and other improvements thereon, and that the possession had been kept up exclusively by said defendants and those under whom they hold, down to the trial. This possession they claimed to be a defense. It appeared, however, that in 1858 the plaintiffs' ancestor entered to James Basquez grant, but not on the interference, and made a lease on Marlin, permitting him to occupy three hundred and twenty acres. Marlin has ever

since resided there, holding as tenant under the plaintiffs or their ancestor.

The charge of the court as follows:——

"The facts, as I understand the defendants to claim them, are that in 1855, under the Marlin title, and in 1856 or 1857, under the Sanchez title, they took actual possession of their lands lying within the conflict.

From that date the Statute of Limitations began to run in their favor for the lands embraced within their title as against the Basquez title. If three years elapsed before they were ousted by a superior possession then their occupancy for three years makes a complete bar to any recovery by the plaintiffs.

But the plaintiffs claim that in May 1857, before the defendants had been in possession for the period of three years of any lands within the conflict, their possession was interrupted by the entry upon the Basquez grant of James Marlin as the agent for Mrs. Elberly.

If you find this fact to be as the plaintiffs claim, that James Marlin entered upon the Basquez grant in 1857 as the agent for Mrs. Elbery, claiming title to the whole in her name, we instruct you that for that time the possession of the defendants—they holding undr a junior title—was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper title.

From Jan. 28, 1861, to the 30th of March, 1870, the Statute of Limitations in this State was suspended. No extension, therefore, of the actual possession of defendants between these dates would avail them unless held for three years after the statute had again commenced running, and before the commencement of this suit.

It is this instruction of which the defendants complain, but we think it was correct. It was in accordance with the doctrine asserted in Clarke's Lessee v. Courtney (5 Pet. 319), and generally recognized. It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will b deemed to be sisseised to the extent of the boundaries described in that title. Still, his possession beyond the limits of him actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land claiming title to the whole, he has the constructive possession of all the land not in actual possession of the intruder, and this, though the owner's of actual possession is not within the

limits of the defctive title. The reason is plain. Both parties cannot be siezed at the same time of the same land under different titles. The law, therefore, adjudged the seisn of all that is not in the actual occupancy of the adverse party to him who has the better title. These distinctions are clearly shown in the cases. One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense such, we think, is not the law. When the owner of the Basquez title entered upon the tract, took actual possession of a part of his tenant and retained it, claiming the whole, the law gave to that owner the constructive possession of all that was not in the actual adverse possession or occupancy of another.

In Altemus v. Long (4 Pa. St. 254), it was ruled that though actual possession under a junior title of part of a tract of land, which interferred with an older grant, gave possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner upon any part of his land was an outster of the intruder from what they had in constructive possession merely. We know of no authoritative decision that is in conflict with this.

It is difficult to say of the eighth assignment of error that it is not sustainable. The answer to the defendants point was clearly correct.

The remaining exception is to the sufficiency of the verdict. It is said it was indefinite, uncertain, and did not find the main issue viz., how much of the defendant's land, if any, is covered by the Basquez grant. This is not necessary for us now to discuss. It may be the verdict was not sufficiently certain, but as the case goes back for another trial, the matter is of no importance now.

Judgment reversed and cause remitted for a new trial MR. JUSTICE FILED AND MR. JUSTICE BRADLEY dissented.

VOL. XII.

OSTERMAN v. BALDWIN

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1. A citizen of the United States, and who, as such, was of

course before the admission of Texas into the Union, as an alien to that republic, and so, as against office found, incompetent to hold land there, because on the admission, competent, no office having been previously found.

2. A purchaser at Sheriff's sale buys precisely the interest which the debter had in the property sold, and takes subject to all outstanding equities.

3. Trusts of real estates are not embraced by the statute of frauds of Texas, and may be proved, as at common law, by patrol.

4. A mere declaration in writing by a vendor of a vendee's purchase of land, that the vendee had paid the money for it, and that the vendor intended to make deeds when prepared to do so, is not a document purporting to convey title; and accordingly will constitute neither a link in "a consecutive chain of transfer," nor "color of title" within the meaning of the fifteenth section of the statute of limitation of Texas.

APPEAL (submitted) from the District Court for the Eastern District of Texas in 1830, prior to the admission of Texas into our Union, and that Country being then an independent republic, Baldwin, a citizen of New York, and an alien, of course, to Texas, purchased and paid for three lots in Galveston, from the Galveston City Company a corporation created by law, with power to sell real estate, and which owned the lots sold. As the company was not at the moment ready to execute deeds, he received certificates of the purchase. They described the purchased lots, acknowledged the receipt of the purchase-money, and added that Baldwin was entitled to receive a conveyance, as soon as the company was prepared to execute deeds in proper form. The certificates were made out in Baldwin's own name. The constitution of Texas, however, prohibiting aliens from holding lands there, he transferred them to James S. Holman, a Texan; the purpose having been "to place the lost in the hands of a citizen to watch over and protect them, for the payment of taxes and otherwise." No consideration moved from Holman, and the transfer was on an express agreement (made only by parol, however), that Holman was to hold the lots, and take a conveyance of them from the company, as Baldwin's trustee. The certificates were placed in an envelope, on which was endorsed a memorandum, thus:

"No. 113.
"James S. Holman."
"Lots No. 5 and 11, in block 617, &c
"In Trust."

This envelope, with the certificates enclosed, was subsequently found in the office of the company, having, as was said by the one side, been left there for safe keeping at the time, and by the other, having been brocght there in order that a deed might issue to Holman and surrendered and filed on the issue of a deed accordingly. The letters and figures "No. 113," indicated the number of the deed to be issued for these lots.

In September, 1846, the lots were levied on by the Sheriff of Galveston County, upon a judgment obtained by one McKinney against Holman. Notice was given to McKinney of Baldwin's ownership of the lots, and that Holman had never had any interest in them, except as trustee for Baldwin.

At the sale, October 6th, 1846, full notice was read aloud by Baldwin's agent, to the persons assembled, of Baldwin's claim to the lots, and of the exact state of his title. The sale was then proceeded with, and one lot was struck off to Osterman, others to other persons. The purchasers took possession.

In May, 1850, that is to say, more than three years after the sale, Baldwin filed a bill in the District Court for the District of Texas, making the Galveston City Company, Holman, Osterman, McKinney and others, defendants; and praying that the Galveston City Company might be directed to execute conveyance in fee simple to him, that the sale and proceedings under the judgment and excution against Holman might be declared void, and the defendants enjoined from setting up title under the same, and be ordered to deliver up possession of the lots held by them respectively.

The defenses set up were:

1. Baldwin's alienage and consequent incapacity to hold; that even if the lands were meant to be held by Holman in trust for him, the trust was void; that on his part of the defense it mattered not whether there was a deed or certificate, Holman's estate, if but equitable, being liable to levy and sale, that however a deed was made.

2. That if these defenses failed; the suit was barred by the statute of limitation of Texas.

As to the fact whether any deed had been made to Holman, the testimony was not quite consistent. On the one hand, the secretary of the company, the complainant's witness, testified thus:

"Whenever the holder of a certificate wished a deed, he produced his certificate to the company and delivered up the same, and the company issued a deed to him. The certi-

ficate was then filed away in the records of the company. Books were kept showing the issue of deeds upon the certificate, by memorandum entered against the number of the lot. All the certificates in this case were filed away in the records of the company, in the same place and manner, with the certificates upon which deeds had been issued. The books and records of the company bear the same evidence of the deed to Holman on the certificates, that they do of the issue of any deed whatever. If the records of the company are true, a deed issued to Holman. The memorandum No. 113, in the envelope, indicates that that was the number of the deed issued on the certificates."

On the other hand, Holman himself remembered no deed: and one Edmunds, the agent of McKinney, who seemed to manage the whole matter of the execution under a bargain for a large contingent share of its proceeds, twice examined the books of the City Company, once by himself and once, ("thinking it an important matter"), with another person, an attorney-at-law,—and found that the books "showed that no deed had then been issued," and that "the title still appeared to be by certificates in the name of Holman."

As respected a bar by the statute of limitations, the second defense set up, it appeared that the Texas act in its fifteenth section ran thus:*

"Every suit to be instituted to recover real estate as against his, her or them in possession under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. By the term title as used in this section, is meant a regular chain of transfer from or under sovereignty of the soil; and color of title, is constituted by a consecutive chain of such transfer deed to him, her or them in possession, without being regular; as if one or more of the memorials or muniments be not registered nor act duly registered, or be only in writing, or such like defect as may not extend to or include the wand of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant or land script, with a chain of transfer down to him, her or them in possession."

The District Court decreed in favor of the complainant. The purchasers appealed; Holman and the company not denying Baldwin's equities, and acquiescing.

Messrs. Adams, Coombs, and Ballinger, for the appellants:

1. The evidence of the deed's having issued, greatly preponderates over that of its having not issued. The possession by the company among its papers, of the certificates, the only evidence of individual ownership, and the testimony of the secretary of the company, offered a strong presumption that there was a deed. The purpose of conveying to Holman was that a deed should issue to him. It matters not, however, as respects this branch of the defense, whether Holman's title were legal or equitable, if he had the real title—of any kind. Equities can be levied on in Texas as well as legal estates.

2. We had such title. It having been illegal for the complainant to hold land in Texas at the date of these assignments, the law did not imply, create or allow any trust whatever in his favor, nor crest one in favor of the government of Texas; but Holman took and held the property free and clear of any trust or right whatever for or on the part of Baldwin or the government.

Nor did the admission of Texas into the Union help the matter. The law not having previously raised or recognized any trust in behalf of Baldwin, nor of the government as the sovereign, by escheat or other paramount right, no trust or right of any kind in his favor was created by that political act.

At best, the only evidence of any trust in favor of Baldwin was parol; a dangerous sort of proof on which to rest the title to real estate; and a sort which the British statute of frauds would not allow to be given in such a case.

3. If Holman was thus the sole owner—whether legal or equitable—Baldwin had no title, and the various notices were of no value. They were notices of nullities.

Waiving all these points however, we have about and independent of the other defense—

4. The Statute of limitations. If the Galveston City Company made a deed to Holman, then the appellants had a "regular chain of transfer" with the single execution free its regularity that the deed to Holman was not recorded, a circumstance which confessedly would not affect it. We have referred to the evidence of the existence of the deed. "A regular chain of transfer" relates to the deeds, the muniments, the paper evidences of right. If on their face, they constitute a title, the actual nature of that title, arising from

extriasic facts, from the existence of a supreior or better title, either in a first link by a previous grant from the government, or in any subsequent link by a previous better conveyance, is unimportant. If possession be held three years under a chain of deeds from the sovereignty of the soil, by the 15th section the character of the actual title at any point of the chain is unimportant. "Intrinsic fairness had honesty" is not a question where a regular chain of transfer is shown. They apply to color of title where the transfers are not regular. But the meaning is, not that the consecutive chain of transfer, or any link of it must be fair and honest in relation to the adverse, better title, but simply that if one or more of the links, instead of being a regular deed—for instance from A or B—is such a transfer of the righ of A or B, whatever the right is, as amounts fairly and honestly to a conveyance of it, then it constitutes color of title. In short, "title" is legal; "color of title" is equitable.*

Messrs. Sherwood and Goddard, contra.

Mr. Justice Davis delivered the opinion of the court. It is true, as the defendants insist, that when the purchases were made by Baldwin, Texas was foreign country, with a constitution forbidding alients to hold real estate. But the defendants cannot object on that ground. Until office found, Baldwin was competent to hold hand against third persons. No one has any right to complain in a collateral proceeding, if the sovereign does not enforce his perogative. This court, is Cross v. DeValle, *say: "That an alien may take by deed, or devise, and hold against any one but the sovereign, until office found, is familiar principle of law, which it requires no citation of authorities to establish." Even if the defendants could have made this objection, while the Republic of Texas existed, they cannot make it now, because, when Texas was admittd into the Union, the alienage of Baldwin was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, is as to be deemed a waiver of all liability to forfeiture and a confirmation of ris former title.

It is insisted the legal title to the lots in controversy, is in Holman, by deed from the Galveston City Company, and if so, that the execution against Holman was properly levied buton them, and they were rightfully sold.

There is evidence tending to show a deed to Holman, but it falls short of proving it. It is alpost certain a deed was never made, and quite certain, if made, it was never delivered. Holman, who ought to know, has no recollection about it, and he is fortified by Edmunds (the active agent in hunt-

ing up property to levy on), who swears, the books of the company were examined, and did not show the making of the deed—a matter deemed of importanc by him and his attorney. The deed is not produced; is not recorded; the directors who must have executed it, are not called; and its existence is but a matter of conjecture.

Even if made and delivered, it cannot help the title of the defendants, for the sheriff sold with express notice of Baldwin's rights, and his intention to enforce them, and no one who bought can be considered an innocent purchaser for value. If Holman had the bare, naked, legal title, without any beneficial interest in the property sold, and no possession, nothing passed by the sale. A purchaser, at a sheriff's sale, buys precisely the interest which the debtor has in the property sold, and tales subject to all outstanding equities.

But no deed was, in fact, pade, and the legal title is still in the Galveston City Company. If, in equity Baldwin is entitled to have that title conveyed to him, the defense in this case must fail, unless the plea of the statute of limitations can be successfully maintained.

It is proven, beyond dispute, that Baldwin purchased the lots and paid the money for them, and that Holman had no interest in them.

It is an equal proof, that Holman agreed to hold them in trust for Baldwin—the object being to place them, in the hands of a citizen of Texas, who could pay taxes and protect them. The trust, thus created, is an express trust—not one resulting by implication of law—proved, it is true, by parol, but equally efficacious for the purpose of this suit, as if in writing. The declaration of an express trst, under the status of frauds of 29 Charles II, was required to be in writing, and could not be proved by oral testimony. But the courts in Texas hold, that trusts are not embraced in their statute of frauds, and that a trust may be proven as at common law, by parol evidences. *The eqitbles title is, therefore, in Baldwin, and there is no reason why he should not have legal title, also, unless his rights are cut off by the statute of limitations.

The defendants claim that they have possessed the land peaceably for more than three years, under title, or color of title, derived from the sovereign authority, thus claiming the benefit of the fifteenth section of the act of limitations of Texas. But this claim is unavailng, because one link in "the chain of transfer", first the government down to the defendants, is broken. There is no conveyance from the Gal-

veston City Company to Holman. A "Consecutive chain of transfer" is required by the statute, and the writing possessed by Holman is not, in any legal sense, a link in that chain It does not purport to convey title. It is nothing more than a declaration by the company of the purchase of the lost, the payment of the money, and the intention to make deeds, when prepared to do so. If this writing upon its face, professes to pass title, but failed to do it, either because the city company had no titl, or for want of proper execution, it could be used as color of title. But an agreement to convey title at some future period, is not color of title, within the meaning of the law.

The Supreme Court of Texas has decided the precise question here presented. That learned court, in discussing this subject, in Thompson v. Cragg,* says: "Nor can there be color of title, as defined by the statute where there is a complet hiatus in the chain. Color of title differs from title only in externals. The substance of both is the same: Were this not so, if color of title were something intrinsically and substantially less, or weaker than title, then the wisdom of the legislature could be vindicated in applying the same period of limitation to a possession supported by the one as is applied to a possession supported by the other."

DECREE AFFIMED

I, the undersigned, W. T. Weir, attorney for appellants, herein depose and say that on the _____day of August, 1965, I served a copy of the following Answer to the Motion of the appellees herein, by depositing the same in the United States Post Office at Carthage, Mississippi with air mail postage prepaid, addressed to them and to each of them.

W. T. Weir
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Carthage, Mississippi

Subscribed and sworn to before me at Philadelphia, Mississippi, on this_____day of August, 1965.

Notary Public of Neshoba County, Miss.
My Commission expires Feb. 15, 1966

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